UPAPAYU MANAGEMENT SDN BHD

v.

RAMALOO SIVANJALAM

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[CIVIL SUIT NO: 22-944-2010]
21 AUGUST 2014

CONTRACT: *Damages - Employment - Aircraft maintenance engineer employed by company to maintain aircrafts under letter of appointment - Dissatisfaction over engineer's performance - Termination of engineer's services - Allegations that engineer failed to perform duties expected of him under letter of employment - Whether complaints proved - Claim for liquidated and damages - Whether substantiated*

TORT: *Negligence - Damages - Aircraft maintenance engineer employed by company to maintain aircrafts under letter of appointment - Dissatisfaction over engineer's performance - Termination of engineer's services - Allegations that engineer failed to perform duties expected of him under letter of employment - Whether complaints proved - Whether engineer negligent in carrying out maintenance duties*

EMPLOYMENT: *Contract of service - Termination - Aircraft maintenance engineer employed by company to maintain aircrafts under letter of appointment - Dissatisfaction over engineer's performance - Termination of engineer's services - Allegations that engineer failed to perform duties expected of him under letter of employment - Whether engineer fairly dismissed as employee*

Pursuant to a letter of appointment ('LOA'), the defendant, an aircraft maintenance engineer, was employed by the plaintiff, a company that owns private commercial jet aircrafts. In the course of the employment, the plaintiff was dissatisfied with the defendant's performance and after a series of correspondences between the parties, an investigation was conducted on the defendant. Following the investigation report ('Metrojet report'), the plaintiff terminated the defendant's employment and claimed against the defendant for breach of contract and negligence. The plaintiff relied on the Metrojet report in submitting that there were failures on the defendant's part (i) to upkeep the log book in an orderly and proper manner; (ii) to regularly check and inspect the aircraft tyre pressure; (iii) to supervise the ICAC inspection; (iv) to carry out pre-flight inspection; and (v) to record the

maintenance log book in respect of the aircraft battery resilience as well as having recharged the battery at an unauthorised centre. As a result, the plaintiff allegedly suffered losses and claimed for liquidated and ascertained damages in the sum of RM853,549. In opposing the plaintiff's claim, the defendant argued that the plaintiff's claim for damages was unsustainable as the defendant did not resign or leave the company but was instead unlawfully dismissed by the plaintiff.

Held (dismissing claims with costs):

(1) The plaintiff primarily relied on the Metrojet report and the Federal Aviation Authority regulations that stipulate the failure of the engineer to maintain and update records is an offence. However, the complaints were general without condescending to particulars and details. The report did not stipulate how the logbook was lacking such as on which dates and what aspect. The relevant defendant's weekly reports were tendered at the trial and they were not unsatisfactory in their content. The conduct of the plaintiff suggested that the weekly reports were to be kept but only submitted if requested. Even if they were meant to be submitted weekly, the plaintiff had waived its rights due to its failure to make a contemporaneous demand for them. This was neither the ground upon which the plaintiff relied on to terminate the defendant's employment nor was it the plaintiff's pleaded case to justify for the recovery of the alleged losses. (paras 23 & 24).

(2) The complaint on the defendant's failure to check the aircraft tyre seemed to be targeted on one incident where the tyre pressure was checked by an external party, D'Nest Engineering. The plaintiff merely referred to the Gulfstream jet manual and concluded that the defendant was in dereliction of duty for failing to maintain the tyre pressures properly to the requirements of the manual. The D'Nest Engineering report was inconclusive as the technician who checked the tyre pressure was not called. In addition to that, this was also a mere single isolated incident. (paras 26, 27, 28, 29 & 31).

(3) The defendant had candidly and honestly explained that he was present at the Gulfstream jet facilities and ensured that all the tests and inspection that were supposed to be done were in fact done. He did not have the authority to supervise the inspection as he was only the owner's representative to

see that all the inspections were carried out in accordance with the manual. The tests and inspection were done during office hours from 0800 to 1700 hours in the day for five days weekly. There was no reason not to believe the defendant. The plaintiff's complaint was most unfounded. (paras 34 & 35).

(4) The plaintiff's complaint that the defendant failed to carry out pre-flight inspection had not been sufficiently established. The defendant had testified that he had conducted his work properly, faithfully and diligently particularly having done the necessary ground runs before the aircraft took off on each flight. The pilot and co-pilot were not available in the court to testify on their version of the story. Having observed the demeanour of the defendant, the court did not have any reason to disbelieve him. (paras 37 & 38).

(5) There was no cogent evidence produced to support the allegations that the defendant failed to upkeep the maintenance logbooks pertaining to the battery and that the battery was recharged at an unauthorised centre. (paras 39 & 40).

(6) The complaints relied upon were unfounded. The defendant was neither negligent nor in breach of the letter of appointment ('LOA'). By the failure of the plaintiff to justify its complaints, the plaintiff had instead committed a wrongful repudiation of the employment contract. The liquidated and ascertained damages provisions in the LOA would only be attracted if the defendant resigns or leaves the employment *ie*, if the defendant was rightfully dismissed by the plaintiff for misconduct. It could not be attracted in law or equity if the defendant was wrongfully ordered to leave as was the case here. The plaintiff was disentitled to its losses as claimed. (paras 43 & 44)

Case(s) referred to:

Ismail Mohamad v. Wan Khairani Wan Mahmood & Another Appeal [2009] 4 CLJ 653 FC ***(refd)***

Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***

Kamalam Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd & Ors [1997] 5 CLJ 250 HC ***(refd)***

Lea Yuen Pok v. Dyson Manufacturing Sdn Bhd [2011] 2 LNS 1302 ***(refd)***

A *Liew Sin Kiong v. Dr Sharon DM Paulraj [1996] 2 CLJ 995 HC* ***(refd)***
National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA ***(refd)***
Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC ***(refd)***

B **Legislation referred to:**
Contracts Act 1950, ss. 74, 75
Evidence Act 1950, s. 101
Industrial Relations Act 1967, s. 20

C *For the plaintiff - T Kumar (V Kamalanathan with him); M/s Thurairaj T Kumar & Assocs*
For the defendant - Jayaletchumi Rajaretnam; M/s Adha Selvi & Assocs

Reported by Najib Tamby

D

JUDGMENT

Lim Chong Fong JC:

E **Introduction**

[1] This is a suit by the employer against the employee under an aircraft maintenance engineering employment contract both for breach of contract and negligence.

F **[2]** The plaintiff is a private limited company that owns commercial private commercial jet aircrafts.

[3] The defendant is an aircraft maintenance engineer employed by the plaintiff.

G **The Trial Process**

[4] The trial of this suit was initially fixed before another judge in late November 2013. By reason that the plaintiff was unable to procure the attendance of its witnesses, the trial was adjourned
H and commenced before me. At the start of the trial, the plaintiff again expressed its difficulty to procure the attendance of several key witnesses particularly the pilots. I offered to the plaintiff to withdraw the case with liberty to re-file. The plaintiff nevertheless elected to proceed and the trial took 3 1/2 days on 24 and 25
I March and 19 May 2014. The trial documents are bundles A to G and exhs. P1 and D1. The plaintiff called Brenda Loo Yun Ting (PW1) who is the personal assistant to the directors of the

plaintiff company as the sole witness for the plaintiff. Likewise the defendant, Ramaloo Sivanjalam (DW1) himself testified as the sole witness for the defendant.

[5] After the conclusion of the trial, the parties simultaneously submitted their written closing submission-in-chief and followed by their written closing submission-in-reply. There was oral clarification with counsel on 21 July 2014.

Background Facts

[6] The defendant's employment as the aircraft engineer by the plaintiff was pursuant to a letter of appointment dated 20 October 2008 ("LOA").

[7] The material terms of the LOA are reproduced as follows:

> **Date of Commencement**
>
> Your employment shall commence on 1st November 2008.
>
> **Reporting Structure**
>
> You shall report directly to the Managing Director for your day to day duties and shall in the course of your employment diligently submit a weekly report to the managing Director reporting on the progress of activities in relation to your job descriptions and day to day duties and obligations.
>
> **Status of Employment**
>
> a) On contract basis and is for three (3) years. The contract is to be renewed subject to the discretion of the company.
>
> b) The Company shall assess your performance during the first six (6) months. In the event your work performance is acceptable, the Company shall not recruit another engineer and shall increase your fixed allowance to Ringgit Malaysia Four Thousand (RM 4,000.00) only.
>
> **Duties & Responsibilities**
>
> You shall possess valid licenses and/or certificates as the Aircraft Engineer under FAA requirement prior to the commencement of your service with the company. You are subject to all operational and administrative procedures, rules and regulations of the Company. You are also to abide with the practices and behavior consistent with the established standards befitting the Aircraft

Engineer and shall be guided by the rules and regulations, notices and other publications issued from the relevant authorities FAA from time to time. Your normal base operations shall be in Kuala Lumpur but the Company reserves the right to assign you to any other locations subject to operational requirements as the company deems fit.

You shall be overseeing the operations, maintenance, record keeping and administration of Gulfstream G-150 and two (2) other aircrafts. The management shall keep you informed of the other 2 aircrafts from time to time.

You shall be responsible for the following:

a) all the aircraft maintenance operation activities and record keeping including liaising with the relevant authorities and/or external parties;

b) ensures accuracy of documentation in aircraft forms and automated systems;

c) ensures adherence to technical data, policy procedure and safe maintenance practices;

d) to submit weekly report on the maintenance and operations of the aircraft;

e) develops, coordinates and executes flying and maintenance schedules;

f) to manage aircraft configuration, daily aircraft servicing and periodic aircraft maintenance inspections;

g) to manage quality assurance, maintenance training, budget and resource management;

h) to define aircraft maintenance procedures and requirements in response to emergency and contingency situations;

i) to coordinate key core logistic requirements supporting aircraft maintenance operations; and

j) any other tasks to be assigned by the management from time to time.

Training And Service Bond

You shall undergo training with Flight safety International to qualify you to overseeing the maintenance services to the aircraft, Gulf stream G-150. You are required to pass the relevant

examination and/or test required by Flight safety International and also to obtain the relevant licenses and/or certificates from the relevant authorities to qualify you to oversee the maintenance services to the said aircraft …

During the said training, you shall:

a) diligently complete the training within the prescribed time;

b) not to engage in any activities which the Company considers jeopardizing the Company's interest and/or reputation;

c) comply with instructions as directed by the Company; and

d) not enter into any other agreement for employment with another party.

In consideration of the training provided, you are required to serve a service bond for the Company for a duration of three (3) years ("the Service Bond Period"). You shall not enter to any arrangement for employment with any third party during the Service Bond Period. The Service Bond Period shall commence from 1st November 2008 and/or on a date to be ascertained by the management.

In the event you resign or leave the Company before the expiration of the service Bond Period, you shall be liable to pay the Company an agreed liquidated damages amounting to RM150,000.00 being the costs and expenses incurred by the Company on the said training …

[8] In the course of the employment, the plaintiff was dissatisfied with the performance of the defendant.

[9] Accordingly the plaintiff issued a "show cause" letter to the defendant dated 12 February 2010.

[10] The defendant responded to the "show cause" letter by his letter dated 16 February 2010 which was replied to by the plaintiff in its letter dated 25 March 2010.

[11] The plaintiff then appointed a Hong Kong based auditor Metrojet to conduct an investigation into the defendant. There was subsequently an investigation report produced by Metrojet dated 5 May 2010.

[12] The plaintiff thereafter by letter dated 11 May 2010 terminated the employment of the defendant. In response thereto, the defendant complained to the Human Resources Ministry and the minister referred the complaint to the Industrial Court pursuant to s. 20 of the Industrial Relations Act 1967.

[13] The plaintiff nevertheless through its solicitors Messrs Firdaus Shanti Bhupin issued a letter of demand to the defendant dated 11 June 2010 claiming losses amounting to RM853,549 and thereafter commenced this suit.

The Plaintiff's Contentions

[14] In gist as pleaded, the plaintiff contends that the defendant negligently and in breach of his employment contract defaulted in his duties in the following manner:

(a) failure to upkeep the logbook in an orderly and proper manner thereby exposed the aircraft and passengers to real danger of probable air crash;

(b) failure to regularly check and inspect the aircraft tyre pressure;

(c) failure to supervise the IAIC inspection;

(d) failure to carry out pre flight inspection and thereby again exposed the aircraft and passengers to real danger of probable air crash; and

(e) failure to record in the maintenance log book in respect of the aircraft battery resilience as well as having recharged the battery at an unauthorised centre.

The plaintiff placed substantial reliance on the Metrojet investigation report to support its contentions.

[15] In the result the plaintiff alleges that it suffered losses amounting to RM853,549 comprising of:

(a) liquidated and ascertained damages of RM150,000;

(b) costs of Metrojet investigation report of RM6,400;

(c) costs of changing two aircraft tyres amounting to RM5,949.60; and

(d) loss of use of aircraft for three months estimated at RM691,200.

The Defendant's Contentions

[16] The defendant basically put the plaintiff to strict proof of its allegations as well as the losses incurred.

[17] Furthermore the defendant contends that the plaintiff's claim for liquidated and ascertained damages is unsustainable by reason that the defendant did not resign or leave the company but was instead unlawfully dismissed by the plaintiff. The case of the wrongful dismissal has commenced before the commencement of this suit and is presently heard in the Industrial Court. The defendant has pleaded that this court should not therefore deal with this matter.

Findings Of The Court

[18] First and foremost, I will deal with the concurrent proceedings that are before this court as well as the Industrial Court. There are undoubtedly connected issues in both courts particularly on the termination of the defendant's employment and the consequences thereto.

[19] It is nonetheless clear that both courts can proceed concurrently. In the Federal Court case of *Ismail Mohamad v. Wan Khairani Wan Mahmood & Another Appeal* [2009] 4 CLJ 653, Zaki Tun Azmi CJ held at p. 663 that:

> [19] In my opinion, there is a fallacy in the Court of Appeal judgment that there is an overlapping jurisdiction or "assisting jurisdiction". *There cannot be an overlapping jurisdiction between the civil court and the Syariah Court. Neither can there be double proceedings as submitted by the husband. On the facts of this case, the action in the Syariah Court and the derivative action in the High Court are two separate independent actions although the results may seem to overlap.* Therefore questions (a), (b), (c) and (d) of para. 12 above are answered in the negative because there is no overlapping jurisdiction resulting in no question of the party having to elect the same and therefore there was no abuse of process of the court. (emphasis added)

The industrial court applied this case in *Lea Yuen Pok v. Dyson Manufacturing Sdn Bhd* [2011] 2 LNS 1302 and went ahead to hear the dispute notwithstanding that the civil court was also hearing the related dispute.

[20] Generally it is seen that the plaintiff has endeavoured to prove its case through the testimony of PW1 who is not technically qualified nor experienced in aviation sciences. She is a young office administrator of seven years experience as personal assistant to the directors of the plaintiff company. At the trial, she was merely testifying from the documentary evidence before the court such as the Metrojet investigation report, memorandums, correspondences, weekly logs, etc. In other words, she was repeating aloud the documentary hearsay evidence which I do not find to be very helpful. The plaintiff was not able to procure the pilots as well as the Metrojet investigator to testify and be subject to cross-examination in court particularly on the documentary evidence authored by them.

[21] On the other hand, the defendant personally defended himself and withstood the rigorous cross-examination of counsel for the plaintiff. I find the defendant to be truthful and reliable and he was able to explain the charges that were levelled at him.

[22] Against this evidential backdrop, I will deal with each of the plaintiff's complaints *seriatim* being mindful that the plaintiff by s. 101 of the Evidence Act 1950 bears the burden to prove its case on a balance of probabilities.

Weekly Logbooks

[23] The first complaint of the plaintiff concerned the defendant's failure to upkeep the logbooks in an orderly and proper manner causing safety risks. In this regard, the plaintiff primarily relied on the Metrojet investigation report ("the report") and the Federal Aviation Authority ("FAA") regulations that stipulate the failure of the engineer to maintain and update records is an offence. From my reading of the report, the complaints were general without condescending to particulars and details. For example, the report merely stated that: "Logbook is not up to date with logbook entries. The logbook should reflect all work completed on the airplane for accurate record keeping insuring the airworthiness of the aircraft is represented". The report did not stipulate how the

logbook was lacking such as on which dates and in what aspect. Otherwise it would not be possible for the person complaint against to adequately respond, let alone for the court to decide culpability.

Besides the report also stated: "Logbooks do not current status of airplanes with CMP listing. Maintenance performed previously for components removed and replaced or re installed after maintenance was never updated. Thus making a due list for future maintenance inaccurate". It is apparent that the report is also clothed with technical/avionic jargon which is not fully comprehensible in the absence of explanation and elaboration by the investigator. The defendant has further testified that there were in fact five different logbooks, to wit air frame log, engine log, APU log, technical log, and flight maintenance log, some of which were maintained by him and others by the pilots. The plaintiff was not able to pin point which reports exactly were unsatisfactory below the FAA required standard.

[24] The plaintiff went on to allege that the defendant failed to submit weekly reports as required by the LOA and the defendant even falsified weekly reports. I note that the complaints on the failure to submit weekly reports was raised in the plaintiff's "show cause" letter dated 12 February 2010 which the defendant promptly replied on 16 February 2010 that the weekly reports were last sent until 15 June 2009. The defendant had discussed the matter with the chief executive officer of the plaintiff on 9 February 2010 that the reports were readily available and the defendant would submit the full reports in two weeks. This was done as seen in the plaintiff's subsequent letter in reply dated 25 March 2010 where the plaintiff acknowledged receiving the weekly reports of June 2009 to February 2010 on 21 February 2010. All the relevant defendant's weekly reports were tendered at the trial and I do not think that they were unsatisfactory in their content.

On reading the LOA, it is arguable in my view whether the express defendant's duty and obligation in clause (d) therein required the defendant to keep weekly records but to submit them as and when requested or to submit the records weekly. Notwithstanding that the defendant was employed since late 2008, the plaintiff appears to have raised this complaint for the first time in February

2010 for non submission of weekly reports that were purportedly outstanding for more than seven months. The conduct of the plaintiff to me suggests that the weekly reports were to be kept but only submitted if requested. Even if they were meant to be submitted weekly, I find that the plaintiff had waived its rights due to its failure to make a contemporaneous demand for them. I also noticed that this was neither the ground upon by the plaintiff to terminate the defendant's employment in May 2010 nor is the plaintiff's pleaded case here to justify the recovery of the alleged loss.

As to the falsification of reports, it seems to be a new point raised after trial as pointed out by the defendant. The alleged falsified weekly reports are those from March 2009 to April 2010 because they were filed in court for trial late and PW1 testified that the plaintiff had not received them. I find that this is a bare and spurious allegation of the plaintiff as I would have expected to see the reports from June 2009 to February 2010 received by the plaintiff on 21 February 2010 for comparison purposes if that allegation is indeed true. Those reports were however not produced by PW1.

[25] In the premises I find and hold that this complaint of the plaintiff is unfounded.

Aircraft Tyre Pressure

[26] The plaintiff's second complaint is on the defendant's failure to check the aircraft tyre pressure regularly. It is not disputed that wrong tyre pressure is hazardous that may result in an air crash.

[27] The complaint seem to be targeted on one incident on 14 April 2010 where the tyre pressure check done by an external party, D'Nest Engineering showed the following tyre pressures:

(a) Nose wheel	–	left	105 psi
		right	98 psi
(b) Main wheel	–	left outboard	123 psi
		left inboard	124 psi
		right outboard	120 psi
		right inboard	124 psi

[28] The technician from D'Nest Engineering in the name of Kamarudin who carried out the check was not called by the plaintiff to testify.

[29] The plaintiff merely referred to the Gulfstream jet manual where the aircraft manufacturer stipulated that the tyre pressure of the nose wheel and main wheel must be 100 psi and 135 psi respectively subject to 5% tolerance. Accordingly the plaintiff concluded that the defendant was in dereliction of duty for failing to maintain the tyre pressures properly to the requirements of the manual.

[30] The defendant in rebuttal testified that the D'Nest Engineering report did not mean anything and taken out of context. He explained that the correct tyre pressure is dependent on various factors such as the time of the day the inspection was carried out, the loading on the aircraft, fuel loading capacity and in particular whether the inspection was pre or post flight. The inspection also ought to be made in the presence of the aircraft maintenance engineer.

[31] In the circumstances, I find that the D'Nest Engineering report is inconclusive especially in the absence of Kamarudin's testimony as well as the plaintiff's proof of the prevailing surrounding circumstances at the point of the inspection as alluded to by the defendant. The inadequate inflation of the tyres might have been critical immediately pre-flight but this has not been proven by the plaintiff. Consequently, I find that this complaint of the plaintiff here has not been satisfactorily made out against the defendant. Besides this is also a mere single isolated incident.

Supervision Of ICAC Inspection

[32] In this respect, the plaintiff did not particularise its complaints both in the pleading and closing arguments. The complaint seems to be centred on the alleged unethical behaviour of the defendant for engaging in extra-marital liaisons whilst he was sent by the plaintiff to Manila, Philippines to oversee the ICAC inspection of the aircraft.

[33] The plaintiff merely produced two photographs of the defendant with a female companion that were retrieved from the defendant's personal computer and accordingly charged the defendant for failing to supervise the inspection besides indulging

in unethical behaviour that is detrimental to the reputation of the plaintiff. The plaintiff did not tender any proof as to exactly when and where the photographs were taken.

[34] The defendant has candidly and honestly explained at the trial that he was present at the Gulfstream Jet inspection facilities and ensured that all the tests and inspection that were supposed to be done were in fact done. He did not have the authority to supervise the inspection as he was only the owner's representative to see that all the inspections were carried out in accordance with the manual. The tests and inspection were done during office hours from 0800 to 1700 hours in the day for five days weekly. He was there in Manila for three weeks and he believed he was at liberty to engage in his own personal activity after office hours and during the weekends.

[35] I have no reason not to believe the defendant and therefore find that the plaintiff's complaint here is most unfounded. I think this was an unfair attempt by the plaintiff to chastise and discredit the defendant.

Pre Flight Inspections

[36] The plaintiff's complaint here is that that the defendant was incompetent and conducted himself in complete disregard of the mandatory regulations. Again the plaintiff did not particularise the complaint in the pleadings and closing argument. It appears that the plaintiff principally relied on the complaint of the pilot C. Paulus that the defendant was incompetent and unwilling to comply with his direction in the pilot's e-mail of 2 April 2010. The defendant is alleged to be a liar and a person who puts the passengers and pilots at risk. Furthermore the defendant improperly shut down the APU by pushing a fire extinguisher arm button.

[37] The defendant denies the complaint and testified that he had conducted his work properly, faithfully and diligently particularly having done the necessary ground runs before the aircraft took off on each flight. He also unwaveringly maintained that the shutting down of the APU as carried out did not pose any problem. The pilot and co-pilot were however not available in court to testify on their version of the story. In this regard, I have carefully observed the demeanour of the defendant under cross-examination on this aspect and I again have no reason to disbelief him.

[38] In the premises, it is my view that the plaintiff's complaint herein has not been sufficiently established.

Aircraft Battery

[39] The pleaded complaint of the plaintiff is twofold. Firstly it is alleged that the defendant failed to upkeep the maintenance logbook pertaining to the battery and secondly the battery was re-charged at an unauthorised centre. There was no cogent evidence produced in support of the complaint. The plaintiff appears to have abandoned this complaint in its final argument.

[40] Nevertheless the defendant has testified to the contrary and he even has referred to documentary evidence that the battery was charged at Transmile Air Services Sdn Bhd which is approved by the Department of Civil Aviation Malaysia. PW1 was not able to answer in rebuttal.

[41] To sum up, it is plain that the plaintiff is not able to substantiate its five complaints with cogent and compelling evidence. In other words, the complaints are simply empty allegations. Nevertheless, these complaints formed the basis of the plaintiff's case here that is framed both in negligence and breach of contract to claim for its loss suffered against the defendant. It is moreover seen that despite the plaintiff's "show cause" letter dated 12 February 2010 issued to the defendant, the eventual plaintiff's letter to terminate the defendant's employment dated 10 May 2010 were not entirely based on the grounds asserted in the 'show cause" letter but the five complaints discussed above. For those grounds or complaints there were left out such as the alleged absence from work, they must be treated as waived or condoned following the court of appeal case of *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681; [2000] 2 AMR 1387.

[42] The plaintiff has relied on the case of *Kamalam Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd & Ors* [1997] 5 CLJ 250; [1996] 4 MLJ 674 on the expected standard of care of an employee and the case of *Liew Sin Kiong v. Dr Sharon DM Paulraj* [1996] 2 CLJ 995; [1996] 5 MLJ 193 to invoke the doctrine of *res ipsa loquitur* in attempt to establish culpability on the part of the defendant. I am of the view that the doctrine of

A *res ipsa loquitur* is inapplicable here because the causation of the alleged loss (being the five complaints herein) is known to the plaintiff. In any case, since I have found that the complaints relied upon are unfounded, the defendant is consequently neither negligent nor in breach of the LOA.

B

[43] As to the termination of the defendant's employment, I find and hold that by the failure of the plaintiff to justify its complaints herein, the plaintiff has instead committed a wrongful repudiation of the employment contract. See *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266; [1985] 2 MLJ 291. It is plain that the plaintiff by its conduct has evinced its intention no longer bound by the employment contract. In consequence, the defendant was wrongfully dismissed. The liquidated and ascertained damages provision in the LOA would in my view only be attracted if the defendant resigns or leaves the employment; say if the defendant has been rightfully dismissed by the plaintiff for misconduct. It cannot be attracted in law or equity if the defendant was wrongfully ordered to leave as is the case here.

E

[44] Accordingly, the plaintiff is disentitled to its losses as claimed. Besides, I also observed that the plaintiff did not cogently prove the quantum of the losses allegedly suffered particularly the liquidated and ascertained damages and loss of use of the aircraft. In the former, actual loss must be proved by reason of s. 75 of the Contracts Act 1950 as made clear by the Federal Court in *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569. The plaintiff is attempting here to recover the sum stipulated in the LOA simpliciter without adducing evidence of actual loss such the additional costs of a new engineer. This is not a claim which by its nature cannot be or is difficult to assess in the ordinary way based on s. 74 of the Contracts Act 1950. As to the latter, the evidence adduced as testified by PW1 is a mere speculative estimate of loss of aircraft use unsubstantiated with past records and/or cancellation of future bookings. The rate claimed at USD 600 per hour has not been shown to be comparatively reasonable too.

[45] In the premises I reject the plaintiff's claims of losses suffered.

I

Conclusion

[46] This is a case where there seems to be a working relational fallout between the plaintiff's pilots and the defendant that culminated in the plaintiff desiring to get rid of the defendant. My findings are however that the plaintiff's complaints relied upon to justify its actions against the defendant are unmeritorious.

[47] In the circumstances, I hereby order that the plaintiff's claims in this action be dismissed with costs of RM30,000.